

No. 78-826

Supreme Court, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

ELLSWORTH H. MOSHER, PETITIONER

v.

HON. HOWARD T. MARKEY, CHIEF JUDGE, UNITED
STATES COURT OF CUSTOMS AND PATENT APPEALS,
ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CUSTOMS AND
PATENT APPEALS*

**MEMORANDUM FOR THE
RESPONDENT JUDGES IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General
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Washington, D.C. 20530

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Petitioner seeks review of a decision by the Court of Customs and Patent Appeals (CCPA) to seal the record in the case of *In re Sarkar*, CCPA Docket No. 78-554.

Petitioner was not a party to the *Sarkar* appeal and concedes that he "is in no way connected with Sarkar, either directly or indirectly, and has no interest (commercial or otherwise) in the particular subject matter involved in Sarkar's appeal" (Pet. 5).

1. Sarkar appealed to the CCPA the denial of a patent by the Patent and Trademark Office Board of Appeals, and moved to seal the record under CCPA Rule 5.13(g)¹

¹"In a proper case, where the interests of justice require, and on a convincing showing thereof by motion properly made, the court will sit *in camera*, or seal its record, or both."

so that, in the event of an adverse decision, he could continue to protect the material involved as a trade secret. The CCPA granted the motion and ordered the record sealed.²

Petitioner then moved to vacate the CCPA's order, alleging only that he is a member of the CCPA bar who desires access to the record in the *Sarkar* case (Pet. App. 1-c to 2-c) and that the decision is invalid because it conflicts with the public's right of access to court records. Petitioner did not seek to intervene in the *Sarkar* case. Treating the motion as a petition, and assuming for purposes of the petition that petitioner had standing to challenge the order to seal the record (Pet. App. 2-a), CCPA denied the petition. The CCPA subsequently denied petitioner's application to stay further proceedings in *Sarkar* (Pet. App. 1-f). On November 28, 1978, the Chief Justice denied petitioner's application (No. A-490) to stay the CCPA proceedings. On December 7, 1978, the CCPA affirmed the decision of the Patent and Trademark Office Board of Appeals denying Sarkar a patent.

2. Review by this Court is unwarranted. Petitioner was not a party to the case in the CCPA and has never sought to intervene in that court or this. By his own admission he "has no interest * * * in the particular subject matter involved in Sarkar's appeal" (Pet. 5). Accordingly, he is not entitled to file a petition for a writ of certiorari in this Court. See *Ex parte Leaf Tobacco Board of Trade*, 222 U.S. 578, 581 (1911); R. Stern & E. Gressman, *Supreme Court Practice* 433 (5th ed. 1978).³ This petition does not

²The CCPA's order is reported at 575 F. 2d 870 (C.C.P.A. 1978).

³28 U.S.C. 1254 explicitly limits to "parties" the persons who may file petitions for certiorari to seek review of judgments of the courts of appeals. Although 28 U.S.C. 1256, which governs review of CCPA decisions, does not contain a similar explicit reference, there is no reason to believe that Congress intended the practice to be different.

present a rare or unusual situation that would warrant this Court's permitting petitioner to seek certiorari despite his nonparty status in the proceeding below.⁴

Although the CCPA assumed that petitioner had standing to challenge its authority to seal a record, that assumption would not confer on this Court the power to adjudicate the case. Under this Court's settled law of standing, petitioner lacks the requisite concrete injury in fact to give him standing. Petitioner's allegation amounts to no more than an "abstract concern with a subject that could be affected by an adjudication" that "does not substitute for the concrete injury required by Art. III." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40 (1976).

In any event, the CCPA's order sealing the record in *Sarkar* is entirely within its authority to protect litigants' trade secrets. The common law right of access to judicial records is not absolute, as this Court recognized in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978), and CCPA here exercised its authority to seal the record to protect trade secrets should the patent ultimately be denied (as it was). Cf. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974).

Rule 5.13(g) is merely CCPA's analogue to Fed. R. Civ. P. 26(c)(7), which authorizes district courts to issue "any order which justice requires" to protect trade secrets. Furthermore, patent applications are kept confidential by the Patent and Trademark Office, 35 U.S.C. 122, and it would be anomalous to force an applicant to take the risk that he will forfeit this confidentiality if he invokes his right to judicial review and the CCPA concludes that the discovery is not patentable.

⁴Cf. *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968), 389 U.S. 813 (1967), granting a petition to intervene and petition for certiorari filed by a person who was not a party in the court of appeals.

The CCPA recognized that its rule would be invoked in only a few cases and that applicants would be successful in even fewer (Pet. App. 5-a). Indeed, the CCPA noted that since Rule 5.13(g) went into effect in January 1974, there had been only two requests to seal records (*ibid.*); *Sarkar* was apparently the first time such a request was granted (Pet. App. 4-b). The CCPA thus has exercised its authority to protect litigants' rights in a reasonable manner, balancing the public's right of access against Sarkar's right to trade secret protection.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1979